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No. 84-215

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Comes now Multi-State Communications, Inc. (Multi-State), petitioner in the above-entitled proceeding, and pursuant to the provisions of Rule 16.6 of the Rules of the Supreme Court of the United States, respectfully submits this Supplement to its Petition For Writ Of Certiorari filed on August 6, 1984. As shown below the facts reported in this Supplement were not available at that time.

A. Status At The Time Of Filing Of Petition For Writ Of Certiorari

A detailed summary of the pertinent facts of record will be found in the Multi-State petition for writ of certiorari

filed on August 6, 1984. Briefly, the Federal Communications Commission, claiming it was acting pursuant to new Section 331 of the Communications Act of 1934, as amended, permitted RKO General, Inc. (RKO), a heretofore disqualified broadcast licensee, to reallocate its television channel (Channel 9) to New Jersey from New York and granted it a five-year license *without ever determining RKO's qualifications to be a broadcast licensee.* At the same time, the Federal Communications Commission summarily dismissed the challenging application of Multi-State which has been prosecuted for twelve years.

Multi-State contended (1) that the language of the new Section 331 did not authorize the transfer of the station and the granting of a five-year license to RKO and (b) the summary dismissal of the Multi-State application without a hearing to determine the qualifications of RKO to be a licensee violated public policy and deprived Multi-State of its right to due process under the Fifth Amendment.

At the time of the reallocation, grant of the five-year license to RKO and the dismissal of the Multi-State application, RKO was the subject of a Federal Communications Commission hearing[1] to determine whether RKO was qualified to be a licensee in view, *inter alia,* of its proven lack of candor in dealing with the Commission,[2] serious allegations of filing false and misleading financial reports with the Commission and allegations that RKO had misled the Commission or was lacking in candor in providing de-

[1] *RKO General, Inc. (KHJ-TV),* Docket No. 16679, et al.

[2] *RKO General* v. *FCC,* 670 F.2d 215 (C.A.D.C. Cir. 1981). The Federal Communications Commission found RKO to be disqualified in Boston (WNAC), New York (WOR-TV) and Los Angeles (KHJ-TV). The Court of Appeals upheld the Boston disqualification but remanded New York and Los Angeles to the Commission for a "principled explanation" of this disqualification. It was during this period that the new Section 331 of the Communications Act was enacted.

tails of Internal Revenue Service investigations. This hearing involves challenges to the renewal of the licenses of fourteen RKO broadcast facilities including KHJ-TV in Los Angeles.

B. Developments After The Filing Of The Petition For Writ Of Certiorari

1. RKO'S $7.9 MILLION OVERCHARGE

On August 13, 1984, subsequent to the filing of the Multi-State petition, RKO filed a twenty-page Report with the Federal Communications Commission which Report is part of the basis for this Supplement.

In this Report, RKO acknowledged that, for the period December 1, 1982, through May 31, 1984, RKO, through its wholly-owned subsidiary, RKO Radio Networks, Inc. (Networks), had overcharged its advertisers and underpaid its affiliates approximately $5.9 million.

In previous incorrect reports filed with the Federal Communications Commission on June 26, 1984, and June 28, 1984, RKO acknowledged only $4.0 million in overcharges and underpayments.

On September 28, 1984, in a statement filed with the Federal Communications Commission, RKO stated that the correct figure was $7,900,000.00 in overcharges and $300,000.00 in underpayments.[3]

Based on the earlier incorrect estimates of RKO, a request was made by Fidelity Television, Inc., one of the applicants in Docket 16679 mentioned above, for the desig-

[3]On October 12, 1984 RKO acknowledged to the Commission that the Securities and Exchange Commission was investigating the overcharge matter.

nation against RKO of a fraudulent billing issue. That request for a fraudulent billing issue was supported, on August 13, 1984, by the Mass Media Bureau of the Federal Communications Commission wherein the Bureau stated:

> "The Mass Media Bureau agrees with Fidelity that the misconduct disclosed by RKO raises serious questions regarding RKO's qualifications *that should be explored in a hearing.*" (Emphasis supplied).

Additionally, the RKO Report notes that Networks, the RKO subsidiary had, as its president, from 1979 through 1984, an individual named Thomas Burchill. RKO, on page 17 of its Report, admits to an assertion by Burchill that top executives of RKO, including Robert Williamson and John Fitzgerald, RKO General's Comptroller, were "aware of the practices in question."

In its Report RKO does not deny this allegation although it makes the self-serving statement that it is "aware of no evidence suggesting that any person employed by RKO General participated in the practices giving rise to overcharges to advertisers."

2. DESTRUCTION BY RKO OF ITS INTERNAL AUDIT REPORT[4]

On August 26, 1984, after resisting disclosure for many months, RKO, under an Order from the FCC Administrative Law Judge in the RKO KHJ-TV (Los Angeles) case, turned over the Arthur Young Report to Fidelity Television, Inc. (the challenger in the KHJ case). The Arthur Young Report contains dramatic disclosures that have the

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[4]The 1974 Internal Audit Report relates to matters of trade and barter that were the subject of some of the issues designated against RKO in the current *KHJ, et al.*, hearing at the Commission.

most serious possible consequences for RKO's qualifications to remain a Commission licensee. Briefly, the Arthur Young Report states that RKO's senior management denied the existence of, but had ordered the destruction of all copies of the RKO 1974 internal audit report of trade and barter at the New York stations because RKO management believed that the documents, if disclosed, would jeopardize RKO in its pending license renewal proceeding before the Commission. After being told by RKO that no copies of the document had been retained, Arthur Young, quite by accident, discovered a copy buried in an apparently unrelated file.

Based on the material in the Arthur Young Report, Fidelity, on September 4, 1984, filed with the Federal Communications Commission a Motion To Enlarge Issues based on the Arthur Young Report. The issues requested are as follows:

(1) whether RKO "sought to destroy the 1974 internal audit report to prevent its coming to the Commission's attention;

(2) "whether John B. Fitzgerald made misrepresentations and/or lacked candor in his March 1984 deposition testimony concerning whether any documents relating to RKO trade and barter had been destroyed; and

(3) "the facts and circumstances of the Special Review Committee's failure to disclose in its Report its findings concerning RKO's effort to destroy the 1974 internal audit report."

After the filing of the Fidelity Motion To Enlarge, RKO moved, on September 12, 1984, to extend the time for filing its response for almost two months (to November 13, 1984). On September 18, 1984, the Administrative Law

Judge or[illegible] 'KO to file its response no later than Septemb[illegible].

In its response RKO noted, in an almost unprecedented manner, that *it would not oppose the addition of the first issue requested relating to RKO's destruction of the 1974 internal audit report to prevent its coming to the Commission's attention.*[5]

SUMMARY

In its Petition For A Writ Of Certiorari, Multi-State noted (at p. 17) that Section 309 of the Communications Act (47 U.S.C. Sec. 309) as construed in this Court's landmark decision in *Ashbacker Radio Corp.* v. *FCC,* 32 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945), mandates a full comparative hearing in every case involving mutually exclusive applicants for a broadcasting license. Multi-State also noted that in license renewal cases (as in the instant case) "the FCC is required to make an affirmative finding that the public interest will be served by granting the license." *West Coast Media, Inc.* v. *FCC,* 695 F.2d 617 at 622 (D.C. Cir. 1982).

As noted above, RKO is and was the subject of a Federal Communications Commission hearing to determine its qualifications as a licensee. The original allegations are substantial and well supported. At the time of the filing of Multi-State's Petition For Writ Of Certiorari, a most unusual enigma existed. The Federal Communications Commission was probing serious charges as to RKO's qualifications to be a licensee of fourteen different broadcast stations. At the same time, under cover of a questionable intepretation of a new Section of the Communications Act

[5]On October 11, 1984 the Administrative Law Judge designated the requested issues against RKO and ordered a hearing on the matters.

(Section 331), the Commission was permitting RKO to move its New York station to New Jersey and granting RKO a five-year license *without ever determining the qualifications of RKO to be a licensee* in direct contravention of the requirements of *Ashbacker* and *West Coast Media, Inc., supra.*

The enigma is further exacerbated by the acknowledgement of RKO that *at the same time it was embarking on its new five-year license* it was engaged in serious overbilling of its advertisers and underpaying of its affiliates. Significantly, RKO has not denied that its Comptroller, John Fitzgerald, was aware of these illegal practices and it is the same John Fitzgerald who is at the core of the earlier financial issue designated by the Commission itself relating to false and misleading financial reports.

Even as RKO was embarking on the questionable five-year license term, it was revealed that an independent and respectable accounting firm had discovered that executives of RKO had ordered the destruction of certain material in fear that if these records were presented to the Commission the RKO license renewals would be in jeopardy. And, again, Mr. John Fitzgerald was at the core of the matter.

The effect of these new facts upon the Commission's decision is or should be palpably significant and proximate. That a full hearing should be granted in such circumstances is a minimal proposition. *W.S. Butterfield Theatres* v. *FCC,* 237 F.2d 552 n. 10 at 556 (D.C. Cir. 1956).

The express terms of new Section 331 do not confer upon RKO the exclusive privilege of retaining its broadcast rights to Channel 9 without the full examination in hearing of its qualifications consistent with the basic law and public policy of the United States which has long gov-

erned the grant of such privileges. *Ashbacker Radio Corp.* v. *FCC,* and *West Coast Media, Inc.* v. *FCC, supra.*

When requesting reallocation of its license to New Jersey and a new five-year license, RKO perpetrated a fraud on the Commission by concealing the $7.9 million overcharge and the intentional destruction of its 1974 records.[6] As noted in *Massachusetts Bay Telecasters* v. *FCC,* 261 F.2d 55 at 61 (D.C. Cir. 1955):

> ". . . misrepresentation and concealment of important and relevant information should be received and should be given substantial weight. . . ."

As noted, *supra,* in requesting reallocation of its license to New Jersey, RKO continued to deceive the Commission by concealing the $7.9 million overcharge and the intentional destruction of the pertinent 1974 records.

If RKO had provided the Commission with the 1974 internal audit report as it should have and had the Commission been aware of the 1982-1984 overbilling, it, the Commission, would scarcely have granted RKO a new five-year license. RKO stands to profit because of its unlawful concealment and destruction of pertinent records.

Elementary concepts of public interest and justice dictate that RKO's qualifications to retain Channel 9 in New York be publicly examined in a full and fair hearing (as is being done with fourteen other RKO stations) in which Multi-State, as a competing applicant, is permitted to participate.

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[6]It should be noted that a substantial amount of the overbilling and the trade and barter questions in the records attempted to be concealed from the Commission relate to the RKO station in New York.

Multi-State, in its Petition For Writ Of Certiorari demonstrated that the new Section 331, if correctly interpreted, could not permit the Commission to reallocate Channel 9, and RKO, the licensee, to New Jersey. Additionally, Multi-State maintains that failure of the Commission to hold a full hearing involving RKO and Multi-State deprived Multi-State of due process. The information in this Supplement more forcefully illustrates the need for a full comparative hearing.

CONCLUSION

Multi-State respectfully suggests several alternatives are available. These are: grant of the Petition For Writ Of Certiorari for the reasons enumerated and expanded upon in this Supplement; remand of the case for a full determination of RKO's qualifications to be a broadcast licensee or defer all action on the Petition For Writ Of Certiorari until the proceedings presently underway resolve the qualifications of RKO to be a broadcast licensee.

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